

OLC #78-836/13

21 July 1978

*Pro/Leg*

MEMORANDUM FOR THE RECORD

SUBJECT: S. 2117, Federal Tort Claims Act Amendments

1. I spoke with Bob Carlstrom, OMB, on S. 2117 the Federal Tort Claims Act Amendments. I pointed out to him that in a revised Department of Justice views letter containing suggested amendatory language several changes had been made which, in my opinion, would have a deleterious affect on this Agency.

2. The first change to Sec. 7801(b) appeared to require an Agency "inquiry" into alleged constitutional torts. Carlstrom explained that this was correct, but that it had always been intended to be required and was rewritten simply because the language in the first submission was indeed unclear on this point. We probably should not push this issue in any event as it is of the "motherhood and apple pie" variety and relatively uncontentious. This is particularly so since it still remains at the discretion of the Agency head as to whether or not a hearing (after the evaluation inquiry results are in) on the issue is in order.

3. The second problem I raised concerned the fact that Justice Department's "new" submission states that "if a hearing is held (the person requesting the inquiry may) appear and give testimony."

The original version omitted the word appear. Our concern in this regard is that it is not explicit in the bill that the witness will only be permitted to appear and give testimony and not also to utilize discovery techniques and cross examine other witnesses. Our position being that broad access to the entire hearing process would involve unreasonable and unwarranted as well as unintended classification and security problems. Carlstrom assured me that our position on this corresponded with the intent of the legislation and that the regulatory section of the bill made this implicitly clear. I told him that I would again review that section but that clear report language would go a long way to assuage my concerns.

4. The third and final issue dealt with court review (in case of appeal) of an Administrative decision. The new language, unlike the old, gives the court broad discretion in determining the need or lack thereof for in camera review. The former Justice position, which we support, made in camera review for "matters specifically protected from disclosure by statute or executive order" mandatory. As I explained to Mr. Carlstrom, the inclusion of one word will change this back again. He agreed that it should be mandatory and promised to check into it today or tomorrow with Justice.

5. We will continue to monitor this legislation and discuss our problems with OMB and, if necessary, Justice.

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Assistant Legislative Counsel

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